

*a***BADIADDIN MOHAMMAD MAHIDIN & ANOR.****v.****FIRST MALAYSIA FINANCE BHD. & ANOR.**

HIGH COURT MALAYA, SEREMBAN

MUSTAPHA HUSSAIN J

b

[ORIGINATING SUMMONS NO. 31-593 OF 1986]

28 APRIL 1988

LAND LAW: *Charge registered - Security for loan - Restriction in dealing with land imposed subsequent to registration of charge - Malay Reservation - Whether charge was void.*

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This was an application to expunge from the land register a charge in respect of land owned by the applicants on the ground that it was void by virtue of s. 211, National Land Code as it was a Malay Reservation. The land was charged to the first respondent as security for a loan given to a third party. After the charge was registered, an endorsement was entered on the register that it was a Malay Reservation. Subsequently, the first respondent's name was inserted in second schedule, s. 17, Malay Reservation Enactment giving them the legal capacity to be a chargor. The loan had been released to the third party.

*d***Held:**

[1] Even though the restriction in dealing with the land was entered in the land register after the charge was registered, the charge was void as the land was a Malay Reservation. However, the applicants were restrained from dealing with the land pending the restitution of the money given to the third party.

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[Application allowed. No costs.]

Case referred to:

Ahmad bin Udoh v. Ng Aik Chong [1970] 1 MLJ 82

*f***Legislation referred to:**

Contracts Act 1950, s. 66

Malay Reservations Enactment (Cap 142) 1933 (Negri Sembilan), s. 17

National Land Code 1965, s. 211

For the applicants - Zainal Abdul Rahman; M/s. Zainal & Partners

For the 1st respondent - Yeoh Siok Kee; M/s. Wang Kuo Shing & Co.

*g***JUDGMENT****Mustapha Hussain J:***h*

The two applicants were and are the registered co-proprietors of land EMR 315 Lot 342 Mukim Repah, District of Tampin ("the said land"). The said land was charged to the 1st respondent as security for the loan of RM400,000 taken by one Ismail bin Omar. The charge was registered on 12 October 1981.

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There was a joint venture agreement between the two co-proprietors (the applicants) to develop the said land together with this Ismail bin Omar (see joint venture agreement dated 29 September 1981) and the said land was charged to finance this joint venture for developing the said land into a housing estate, which practice was in vogue during those booming get rich quick days of making a fast buck by selling houses.

Like many of those greedy schemes our joint venture scheme was also a damp squid and on 27 November 1986, the two applicants here filed this Originating Summons seeking to expunge from the Mukim register the charge presentation and other consequential orders on the ground that the said land was and is a Malay reservation and that the charge was prohibited by s. 211 of the National Land Code to be attested by a lawyer and also that the 1st respondent not being a body or institution named in the 2nd Schedule to the Malay Reservations Enactment to have the capacity of a chargee, the charge was therefore null and void.

Both the applicants when entering into the joint venture agreement, applying for the loan and executing the charge had the advice of a lawyer. The agreement as well as the charge were prepared and done by the said lawyer.

On 9 December 1986, the applicants here applied in this originating summons by *ex parte* but the Court ordered it to be *inter parte*. The applicants sought an injunction restraining the respondents from selling by auction or disposing of the said land pending the outcome of this originating summons.

The senior manager of the 1st respondent in his affidavit opposing the application (Encl. 10) referred to the letter of offer dated 28 September 1981 that the developer had agreed to accept the loan of RM400,000 upon the term that it was to be secured by a legal charge of the said land. Prior to the approval of the loan, the developer provided a valuation report in which it was stated that the land was free from any restriction expressly endorsed on the title or grant. All was well and good. The charge was indeed duly registered by the 2nd respondent as Presentation No. 300/81 Jilid 6, Folio 85 on 12 October 1981.

But on 18 February 1984 by some strange quirk on the part of the Land Office, an endorsement bearing Presentation No. 5.84 Misc Document Vol. III Folio 94 was entered and registered on the title of the said land declaring that the said land was part of the Repah Malay Reservation under G.N. 505-17 dated 16 February 1917. This endorsement should have been entered and registered on the title more than half a century ago.

However, it is clear that in 1981 when the said land was charged there was no mention on the register or on the title that the said land was a Malay Reservation land.

Upon the discovery of this indorsement that the said land was part of a Malay Reservation, the 1st respondent appealed to the Hon'ble Menteri Besar, Negeri Sembilan, to revoke the said indorsement, to which there has yet to be a reply. However, the Pejabat Pengarah Tanah dan Galian, Negeri Sembilan wrote to the 1st respondent that the State Executive Council had agreed to insert the 1st respondent in Schedule 2 of s. 17 of Malay Reservations Enactment. 1933, and this was gazetted as No. 5 P.U. 14/85 dated 27 March 1986.

The 1st Respondent in opposing the originating summons prayed that the O.S. be dismissed and that the applicants be ordered to execute a proper legal charge, since the applicants had at all times agreed to do so, when they did not have the capacity so to do in 1981 which they thought (and every one else thought so) they had.

The 1st respondent had already released the loan to the Developer, the joint venturer and partner of the two applicants.

In a further affidavit (Encl. 11) the two applicants said that they did execute the charge and that to their surprise, the developer, their joint venturer and partner in the housing development scheme, did not receive the first release of RM300,000 of the loan of RM400,000 and that their partner cum joint developer had filed a claim for repayment of the loan facility in High Court at Kuala Lumpur.

- a* On thing is absolutely clear. At the time of the charge the title was clean - there was no indorsement that it was a Malay Reservation. The Hon'ble Menteri Besar and the State Executive Council had impliedly agreed that it was most unfair and an injustice to the 1st respondent as the loan had been released, through no fault of the parties, and had included the 1st respondent under Schedule 2, giving legal capacity to the 1st respondent to be a chargee.
- b* Was the charge then null and void? At the time of the execution and registration, there was no indorsement that the land was under Malay Reservation. The two applicants and their joint venturer also did not know of this restriction and they **in all good faith** entered into this agreement to take the loan to finance the development of the said land and **in all good faith charged their land**. Also **in all good faith**, they promised that if the loan was not repaid, the two applicants will ensure and guarantee the repayment of the loan taken.
- c* It was only after about two years, through no fault of any of the party, that the State Government inserted this restriction. In the circumstances, the charge is only void.
- The loan had already been released at the behest and on the promise of the two applicants. The two applicants, with and/or through their partner in the joint venture, had benefited by the void charge. It is only fair and just that whatever advantage and benefit the two applicants and their partner had derived from this void transaction, be restored to the 1st respondent. Section 66 of the Contracts Act, 1950 is applicable in the circumstances. It will, in the words of Azmi LP in the case of *Ahmad bin Udoh v. Ng Aik Chong* [1970]1 MLJ 82 be scandalous to allow the two applicants and their cohort to keep the money.
- d*
- e* The position now is that there is a pending auction of the said land by the 2nd respondent, the Land Administrator, Tampin. Since the charge is void, the order for sale by auction is therefore void.
- However, pending the application for restitution of the moneys taken by Ismail bin Omar on behalf of the two applicants to the 1st respondent, the two applicants are hereby restrained from disposing of the said land or entering into any deal whatsoever on the subject land.
- f* As these proceedings have arisen through no fault of any of the parties herein, there shall therefore be no order as to costs.
- Order accordingly.

Also found at [1988] 2 CLJ 32

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